

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

KENNETH E. LAW

Claimant

V.

SPX COOLING TECHNOLOGIES, INC.

Respondent

AND

ACE AMERICAN INSURANCE COMPANY

Insurance Carrier

Docket No. 1,071,012

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) appealed the November 17, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) William G. Belden. Leah B. Burkhead of Mission, Kansas, appeared for claimant. Mark Beam-Ward of Overland Park, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 12, 2014, preliminary hearing and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

Claimant asserts he sustained a traumatic injury to his right hand and fingers when he stumbled over a pallet while carrying a metal beam on June 25, 2014, with continued work activities thereafter causing further injury. Claimant asserts he notified his supervisor of the work accident and injury on June 26, but did not request medical treatment. He continues working at his regular duties. On July 30, 2014, at the supervisor's request, claimant completed an accident report.

Respondent argues claimant had a traumatic accident on either June 7 or June 25, 2014, but he did not provide notice until July 30, 2014. Respondent contests the conclusion of the ALJ that claimant sustained personal injury by accident arising out of and in the course of his employment with respondent. In support of that contention, respondent notes there were no witnesses to the accident, claimant's description of the accident is

suspect, claimant was uncertain of the date he was injured and he did not request medical treatment until July 30, 2014.

The ALJ concluded claimant met his burden of proving he sustained personal injury by accident on June 25, 2014, arising out of and in the course of his employment. The ALJ also found claimant provided timely notice. Respondent appeals for reasons set forth above. Claimant asks the Board to affirm the Order.

The issues on appeal are:

1. Did claimant sustain personal injury by accident on June 25, 2014, arising out of and in the course of his employment with respondent?
2. Did claimant provide timely notice?

FINDINGS OF FACT, PRINCIPLES OF LAW AND ANALYSIS

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

The ALJ's preliminary hearing Order sets out findings of fact and conclusions of law that are detailed, accurate and supported by the record. It is not necessary to repeat those findings and conclusions herein. This Board Member adopts the ALJ's findings and conclusions as his own as if specifically set forth herein except as hereinafter noted.

This Board Member would note claimant's Application for Hearing lists June 7, 2014, as his date of accident. On November 12, 2014, the date of the preliminary hearing, claimant filed an amended Application for Hearing, changing the date of accident to "6/25/14; continued performance of work activities thereafter caused further injury." This Board Member is aware that Dr. Prem Parmar's report indicates claimant reported the accident occurred on June 7, 2014. According to claimant, he told Dr. Parmar June 7 and June 25. Claimant testified he was injured on June 25, 2014, and provided considerable detail on how his injury occurred. He testified he told his supervisor, Dan Henry, on June 26, 2014, between 8 and 9 a.m. that the day before, he stumbled over a pallet and injured his right hand. Claimant indicated Mr. Henry looked at his hand and then walked away.

Claimant testified in detail about reporting his accident to Mr. Henry on June 26. Mr. Henry also testified about his recollection of events and when he was first told by claimant that he sustained a work accident. Brett Osborn, environmental health safety specialist for respondent, testified he first learned of claimant's accident on July 30, 2014, from Mr. Henry. He testified that he spoke to claimant on July 30 about his right hand injury, but claimant never indicated the injury was work related.

Claimant's description of the accident was consistent and credible. Only claimant was present when he was injured, which is fairly common when a worker is injured. The fact that claimant was alone when the accident occurred does not make his account of the accident suspect. Claimant's explanation that he did not immediately request medical treatment because he thought his right hand would get better is plausible

As the Kansas Court of Appeals noted in *De La Luz Guzman-Lepe*,¹ appellate courts are ill suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the fact finder. The Kansas Supreme Court has stated: "One of the reasons that appellate courts do not assess witness credibility from the cold record is that the ability to observe the declarant is an important factor in determining whether he or she is being truthful."²

Here, the ALJ had the opportunity to assess the testimony of claimant, Mr. Henry and Mr. Osborn. The Board generally gives some deference to an ALJ's findings and conclusions concerning credibility where the ALJ personally observed the testimony. Based upon the evidence presented, the ALJ specifically concluded claimant's testimony was credible and he presented sufficient evidence he gave timely notice to his supervisor on June 26, 2014. This Board Member concurs. This Board Member finds claimant's testimony, combined with the medical evidence, proved by a preponderance of the evidence that claimant sustained personal injury by accident on June 25, 2014, arising out of and in the course of his employment with respondent.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁴

WHEREFORE, the undersigned Board Member affirms the November 17, 2014, preliminary hearing Order entered by ALJ Belden.

IT IS SO ORDERED.

¹*De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

²*State v. Scaife*, 286 Kan. 614, 624, 186 P.3d 755 (2008).

³ K.S.A. 2013 Supp. 44-534a.

⁴ K.S.A. 2013 Supp. 44-555c(j).

Dated this ____ day of January, 2015.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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William G. Belden, Administrative Law Judge